

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL J. JASSO, JR., and ANTHONETTE
JASSO,

UNPUBLISHED
April 10, 2007

Plaintiffs-Appellants,

v

ORION MARKETPLACE DEVELOPMENT CO.,
L.L.C.,

No. 270645
Oakland Circuit Court
LC No. 2005-071474-CK

Defendant-Appellee.

MICHAEL J. JASSO, JR., and ANTHONETTE
JASSO,

Plaintiffs-Appellants,

v

ORION MARKETPLACE DEVELOPMENT CO.,
L.L.C.,

No. 272768
Oakland Circuit Court
LC No. 2005-071474-CK

Defendant-Appellee.

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

In these consolidated appeals, plaintiffs (“the Jassos”) appeal as of right from the trial court’s (1) grant of summary disposition to defendant (“Orion”) and denial of summary disposition to the Jassos, and (2) award of sanctions to Orion. We affirm the trial court’s summary disposition in Orion’s favor, vacate the trial court’s award of sanctions, and remand for a new hearing regarding sanctions.

The essential facts are undisputed. The Jassos entered into a purchase agreement with Orion on August 31, 2004. Orion agreed to purchase property, and the Jassos agreed to sell it. The agreement required Orion to deposit \$5,000 with the title company, and provided that “[t]he deposit shall be fully refundable during the Inspection Period. However, in the event Purchaser satisfies its Conditions of Closing and fails to close, the Deposit shall be retained by Seller as

liquidated damages in full satisfaction of this Agreement.” The purchase agreement did not define the “Inspection Period.”

Orion’s duty to purchase the property was conditioned:

5. Conditions to Closing. The following conditions are conditions precedent to Purchaser’s obligation to purchase the Property:

A) Purchaser entering into binding contracts to acquire additional real estate (“Additional Acquisitions”) surrounding and in the vicinity of the Property necessary to permit Purchaser’s intended development within One Hundred [and] Eighty (180) Days of the date of Purchaser’s receipt of the title commitment.

B) Purchaser obtaining zoning and site plan approvals necessary with respect to the property and additional acquisitions in form acceptable to Purchaser to the extent necessary for Purchaser’s intended development within Twelve (12) Months from the date of Purchaser’s receipt of the Title Commitment. . . .

C) In the event that Purchaser has submitted to the Township of Orion, Michigan for those approvals described in Section 5B herein, but has not received a conclusive decision from the planning commission and the Township board of trustees, Purchaser shall be entitled to up to Eighteen (18) thirty (30) day extensions. . . . At the commencement of the fourth month of the eighteen, 30 day extension periods and continuing for each month thereafter, Purchaser agrees to pay Seller the amount of \$5,000/month, which is non-refundable but applicable to the Purchase Price.

Regarding default, the purchase agreement provided: “In the event of default by the Purchaser hereunder, the Seller may declare a forfeiture hereunder and terminate their agreements as Seller’s sole remedy. However, Seller shall in addition retain any moneys previously paid hereunder by Purchaser. . . .” The purchase agreement did not define “default.”

The purchase agreement also provided:

Seller hereby grants Purchaser the right to perform any tests or studies on the property that Purchaser deems necessary throughout the term of this Agreement. Any inspections shall not unreasonably interfere with existing tenants['] occupancy and if sale does not close, Purchaser shall restore the property to its original condition. Purchaser agrees to provide Seller with a copy of any inspection documents or surveys pertaining to the Sellers['] Property.

The parties executed an amendment to the purchase agreement in June 2005. The amendment changed, inter alia, the conditions of closing, providing:

Article 5 – **Conditions of Closing** is amended as follows:

Part (c) Purchaser shall be entitled to 30 (thirty), 30 (thirty) day extension periods.

Effective January 1, 2006[,] and on the first day of each month thereafter during 2006 the Purchaser shall pay seller \$3,000 each month. Effective January 1, 2007[,] and on the first day of each month thereafter the Purchaser shall pay seller \$2,000 each month. Said payments shall be non-refundable.

On October 3, 2005, a representative of Orion sent a letter to the Jassos “provid[ing] formal written notice that as of the date hereof, Purchaser has not yet obtained zoning and site plan approval necessary with respect to the Property and additional acquisitions in form acceptable to Purchaser.” The letter further stated:

Purchaser hereby exercises its right to extend the period within which Purchaser may obtain zoning and site plan approval . . . and additional acquisitions for an additional thirty (30) thirty (30) day extensions. This notice is intended to be continuing, and shall not be required to be reissued every thirty (30) days. . . . Purchaser further acknowledges that pursuant to the terms of the Amendment, commencing on January 1, 2006, and thereafter on the first day of each month during 2006, Purchaser shall pay to Seller \$3,000.00 each month; and effective January 1, 2007[,] and thereafter on the first day of each month, Purchaser shall pay to Seller \$2,000.00 each month. [Emphasis added.]

On October 26, 2005, Orion’s representative sent a letter to the Jassos terminating the purchase agreement. The letter stated: “This letter is intended to provide formal written notice to you that Purchaser has elected to terminate the captioned Purchase Agreement. Accordingly, by copy of this letter to the . . . Title Company, Purchaser hereby directs the Title Company to return Purchaser’s deposit of \$5,000.00.”

On December 30, 2005, after negotiations failed to provide a resolution, the Jassos filed their complaint, seeking payment for the 30 extension periods, the \$5,000 deposit, and a copy of an environmental report. Orion moved for summary disposition under MCR 2.116(C)(8) and (10), which the trial court granted under the latter subrule, holding that because the Jassos contended in their complaint that Orion failed to fulfill a contractual duty, the Jassos contended that Orion defaulted; and that because Orion defaulted, the Jassos were limited to the contractually expressed remedies in the event of Orion’s default. Next, the trial court granted Orion’s motion for sanctions, and, finally, granted Orion’s motion for entry of judgment in the amount of \$14,522.93 in attorney fees as sanctions.

The Jassos first argue that the trial court erred as a matter of law in granting summary disposition of count I of the complaint, which sought payment for the extension periods. We disagree.

The proper interpretation of a contract is a question of law that this Court reviews de novo. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Randolph v*

Reisig, 272 Mich App 331, 333; 727 NW2d 388 (2006). Summary disposition is also reviewed de novo. *Klapp v United Ins Group Agency, Inc.*, 468 Mich 459, 463; 663 NW2d 447 (2003).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Such materials are considered only to the extent that they would be admissible in evidence. MCR 2.116(G)(6).

“[W]here contract language is neither ambiguous nor contrary to . . . statute, the will of the parties, as reflected in their agreement, is to be carried out, and thus the contract is enforced as written.” *Muci v State Farm Mut Automobile Ins Co*, 267 Mich App 431, 435; 705 NW2d 151 (2005). Courts generally do not assess the reasonableness of contractual provisions, but apply unambiguous contract provisions as written unless the provisions violate law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).

This Court examines contractual language and gives the words their plain and ordinary meaning. *Wilkie, supra* at 47. “[A]n unambiguous contractual provision is reflective of the parties’ intent as a matter of law,” and “[i]f the language of the contract is unambiguous, we construe and enforce the contract as written.” *Quality Products & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 375; 666 NW2d 251 (2003). In other words, “[w]hen the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law.” *Hubbell, R & C v J D Contractors*, 249 Mich App 288, 291; 642 NW2d 700 (2001). A contract is ambiguous when two provisions “irreconcilably conflict with each other,” *Klapp, supra* at 467, or “when [a term] is equally susceptible to more than a single meaning.” *City of Lansing Mayor v Michigan Pub Service Comm*, 470 Mich 154, 166, 680 NW2d 840 (2004). Whether a contract is ambiguous is a question of law. *Wilkie, supra* at 47.

As noted above, the purchase agreement provided: “In the event of default by the Purchaser hereunder, the Seller may declare a forfeiture hereunder and terminate their agreements as Seller’s sole remedy. However, Seller shall in addition retain any moneys previously paid hereunder by Purchaser. . . .” (Emphasis added.) This exclusive remedy provision is unambiguous. There is no other term with which it irreconcilably conflicts, and it is not equally susceptible to more than one meaning. Thus, the Jassos’ “sole remed[ies]” upon default are to declare a forfeiture, terminate their agreements, and retain any moneys previously paid. *City of Lansing Mayor, supra* at 166; *Klapp, supra* at 467; *Wilkie, supra* at 447.

“Default” is defined by Michigan case law:

A default is defined as ‘The non-performance of a duty, whether arising under a contract or otherwise’ (1 Bouvier’s Law Dictionary, 527); as ‘The omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement’ (Black’s Law Dictionary [2d Ed.] 342); as ‘To fail in fulfilling a contract, agreement, or duty.’ ‘Neglect to do what duty or law requires’ (Webster’s International Dictionary). [*School Dist of City of Lansing v City of Lansing*, 260 Mich 405, 412; 245 NW 449 (1932).]

The Jassos’ argument that Orion did not default lacks merit. The Jassos’ complaint embodies the notion that Orion failed to fulfill its duties under the purchase agreement. The Jassos’ complaint constitutes an “admission” that Orion defaulted.

By the plain terms of the agreement, because Orion defaulted, the Jassos were entitled to their “sole” contractual remedies. The remedies available to the Jassos were contractually limited to declaring a forfeiture, terminating their agreements, and retaining any moneys previously paid. Because the plain language of the contract indicates that these remedies were the Jassos’ “sole remed[ies],” the contract must be enforced as written, *Quality Products & Concepts Co, supra* at 375, and the Jassos are not entitled to any additional remedies. Accordingly, the trial court did not err in granting summary disposition to Orion on count I of the complaint.

The Jassos next argue that the trial court erred as a matter of law in granting summary disposition of count II of the complaint, seeking a copy of Orion’s environmental report. We disagree.

Paragraph 10.f. of the purchase agreement provides:

Seller hereby grants Purchaser the right to perform any tests or studies on the property that Purchaser deems necessary throughout the term of this Agreement. Any inspections shall not unreasonably interfere with existing tenants['] occupancy and if sale does not close, Purchaser shall restore the property to its original condition. Purchaser agrees to provide Seller with a copy of any inspection documents or surveys pertaining to the Sellers['] Property.

Thus, (1) Orion had the right to perform “tests or studies”; (2) “inspections” could not interfere with existing occupancies; and (3) Orion was obliged to provide the Jassos with copies of any “inspection documents or surveys pertaining to the . . . Property.”

Even if this provision is read as proposed by the Jassos, the agreement still provides that in the event of a default by Orion, the Jassos’ “sole remed[ies]” are declaring a forfeiture, terminating their agreements, and retaining any moneys previously paid. Because the plain language of the contract indicates that these remedies were the Jassos’ “sole remed[ies],” the contract must be enforced as written, *Quality Products & Concepts Co, supra* at 375, and the Jassos are not entitled to additional remedies. Accordingly, the trial court did not err in granting summary disposition to Orion on count II of the complaint.

The Jassos next argue that the trial court clearly erred in granting Orion's motion for sanctions. We agree.

This Court reviews a trial court's decision on whether to award attorney fees under MCR 2.114 for clear error. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003). Similarly, this Court will not disturb a trial court's finding on whether a claim or defense was frivolous under MCL 600.2591 unless the finding was clearly erroneous. *In re Costs & Attorney Fees (Powell Production, Inc v Jackhill Oil Co)*, 250 Mich App 89, 94-95; 645 NW2d 697 (2002). "A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *Id.* at 94 (internal quotation marks and citation omitted).

The Revised Judicature Act provides that "if a court finds that a civil action . . . was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred . . . in connection with the civil action" MCL 600.2591(1). "To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs & Attorney Fees, supra* at 94. The court must examine "the particular facts and circumstances of the claim involved." *Id.* at 94-95. The statute defines "frivolous" to mean either "(i) [t]he party's primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party"; "(ii) [t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true"; or "(iii) [t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a).

MCR 2.114(D) provides:

The signature of an attorney or party . . . constitutes a certification by the signer that

* * *

(2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

(3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The sanction for violation of MCR 2.114(D) is provided by MCR 2.114(E):

If a document is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. . . .

Here, the trial court held that sanctions were appropriate under MCL 600.2591(3)(a). But the trial court nowhere intimated whether sanctions were imposed under subpart (3)(a)(i), (ii) or

(iii). The trial court did not find that the Jassos' primary purpose was to harass, embarrass or injure Orion. The trial court did not find that the Jassos had no reasonable basis to believe that their version of the facts was true.¹ And the trial court did not expressly find that the Jassos' legal position was devoid of arguable legal merit at the time the lawsuit was filed, as required. *In re Costs & Attorney Fees*, *supra* at 94. The trial court made no factual or legal findings justifying imposition of sanctions. In the absence of such findings, the granting of sanctions was clearly erroneous.

The trial court stated that its grant of summary disposition of the Jassos' claims is evidence of the lack of merit of the claims. But that is not the standard. The standard, when looking at whether a claim had merit, is that the Jassos' legal position must have been "devoid of *arguable* legal merit." MCL 600.2591(3)(a)(iii) (emphasis added). the fact that a claim is dismissed by summary disposition, does not necessarily mean that it lacked arguable legal merit. "Not every error in legal analysis constitutes a frivolous position." *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002). Under the trial court's reasoning, any time summary disposition is granted, sanctions would be automatic. We find no authority for that standard. Because the trial court's reasons for granting sanctions were either absent or clearly erroneous, we vacate the award of sanctions and remand for a new ruling on sanctions.²

Finally, the Jassos argue that the trial court abused its discretion by awarding an excessive amount of attorney fees as sanctions. In light of our ruling on the previous issue, this issue is moot. *Ewing v Bolden*, 194 Mich App 95, 104; 486 NW2d 96 (1992).

We affirm the summary disposition in Orion's favor, vacate the award of sanctions, and remand for a new hearing regarding sanctions. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Alton T. Davis

¹ The trial court stated that the Jassos presented no documentary evidence in support of their version of the facts. But failing to present documentary evidence in support of one's version of the facts is not the same thing as having "no reasonable basis to believe that the facts underlying that party's legal position were in fact true." MCL 600.2591(3)(a)(ii). Even if a party does not present documentary evidence in support of its version of facts, it still might have had, at the time it filed the complaint, a reasonable basis to believe the facts alleged in the complaint were true. In addition, the Jassos' complaint was not based on facts, but on a reading of the agreement, and the Jassos did present the agreement as "documentary evidence." Orion admitted, at the hearing on its motion for sanctions, that this is not a case in which there were facts that the Jassos thought were true, and they later discovered those facts were not true. This was a case of how the contract should be interpreted, in light of undisputed facts.

² We instruct the trial court to follow the standards contained in MCL 600.2591(3)(a)(i), (ii) and (iii), unless it grants or denies sanctions under MCR 2.114.